Greyhound Lines, Inc. *and* **Robert P. Evans.** Case 27-CA-7021

31 July 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 2 August 1982 Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

The judge found that the Respondent had violated Section 8(a)(1) of the Act when it discharged Robert P. Evans on 3 September 1980[3] for "protectedly expressing common employee concerns to the United States Department of Transportation [DOT] regarding [the Respondent's] bus scheduling policies. . . ." Although the judge credited the Respondent's witnesses in a few of the critical situations and found that the Respondent "was presented with cause for discipline" of Evans for certain 22 August misconduct described below, the judge viewed the discharge of Evans as too drastic a punishment. The judge concluded that the Respondent would not have discharged Evans but for his DOT complaint, which had been found meritorious and had required immediate corrective action by the Respondent. In so concluding, the judge contrasted Evans' situation with those of coworkers Hall and Kooima, who purportedly committed similar infractions, but who were dealt with by the Respondent less severely.

The Respondent has excepted to the judge's conclusion, reasserting the same reasons for Evans' discharge it presented to the judge. The Respondent points out that Evans' insubordinate conduct on 22 August of feigning sickness to escape an unwanted work assignment, viewed in the context of a nonexemplary 3-year work record, adequately provides justification for discharge in Evans' case. The Respondent indicates that, contrary to the judge, there was no attempt to tag Evans with whatever misbehavior it could find against him following his DOT complaint. Rather, the Respondent contends that, after submission of his DOT complaint, Evans engaged in a developing pattern of insubordinate acts. The Respondent further contends that Evans' actions of 22 August were dissimilar from, and more egregious than, the conduct of drivers Hall and Kooima, referred to by the judge, so as to warrant imposing harsher punishment on Evans.

We find merit in the Respondent's exceptions. Contrary to the judge, we find for the reasons discussed below that Evans' discharge was lawful and that the Respondent has met its burden under the allocation of the burden of proof set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).[4]

Evans worked as a relief driver for the Respondent out of its Cheyenne, Wyoming terminal from 1974 until his discharge of 3 September. On 8 May[5] Evans gave the Respondent a copy of a complaint letter addressed to DOT and dated 1 May. Prepared by Evans with the help of fellow driver Kooima, the DOT letter principally concerned a complaint about the Respondent's scheduling of drivers for a round trip assignment between Cheyenne and Rock Springs, Wyoming, without the required rest for the drivers. The complaint was that the Cheyenne-Rock Springs round trip assignment actually required more driving time than the 10 hours permitted by DOT regulations. The DOT letter was not the first time this complaint was brought to the Respondent's attention. The Respondent was aware that several employees shared this concern of Evans, and that Evans himself first raised this complaint at a company meeting for employees held by the Respondent in 1978 for which Evans was orally commended.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In his decision, at fn. 7, the judge rejected the General Counsel's alternate theory for an 8(a)(1) violation premised on Charging Party Evans' alleged attempts to enforce provisions of a collective-bargaining agreement. Since no exceptions were taken, the judge's rejection of the General Counsel's alternate theory is not on review before the Board.

[3] All dates are in 1980 unless otherwise indicated.

[4] We find that, assuming the General Counsel established a prima facie case that Evans' discharge violated the Act, the Respondent demonstrated that it would have discharged Evans even in the absence of any protected activity. Member Zimmerman finds Evans' DOT letter to constitute protected concerted activity in accord with his position taken in *Meyers Industries*, 268 NLRB 493 (1984). In view of the disposition of the case herein, we find it unnecessary to pass on this issue regarding the DOT letter.

[5] The judge incorrectly referred to "1 May" instead of "8 May" as the date of submission of the DOT letter to the Respondent's District Manager Goins.

The DOT investigation, which followed Evans' letter and commenced 13 May, substantiated the complaint about the round trip Cheyenne-Rock Springs assignment as being in noncompliance with DOT regulations. By letter dated 9 July, DOT informed the Respondent of its investigation results and directed immediate corrective action from the Respondent to comply with DOT regulations. In response, the Respondent discontinued its dispatch of drivers for the round trip assignment and notified DOT of such action by letter dated 15 August. Prior to 15 August, the Respondent altered its procedure somewhat by permitting drivers assigned to the Cheyenne-Rock Springs round trip run to be relieved before completion of the entire assignment if otherwise they would exceed the driving time limits of DOT regulations.

On 22 August, Evans was involved in the incident which the Respondent claimed precipitated his discharge. Evans was in North Platte, Nebraska, after having completed an assignment terminating there very early that day. About 11 p.m. on 22 August, an Omaha dispatcher contacted Evans and told him to report to the depot in about an hour to take an assignment to Omaha. With Evans at the time was employee Kooima, who had completed a run to North Platte earlier that day. Both Evans and Kooima were waiting in North Platte for their next work assignment. On learning the designation of the trip—to Omaha rather than home to Cheyenne—Evans feigned sickness and told the dispatcher that he was "dropping sick," which would get him out of the Omaha assignment. The dispatcher suspected Evans was not ill so she asked Evans if he was well enough to drive to Cheyenne, a distance from North Platte approximately equal to the distance between North Platte and Omaha. Evans answered affirmatively. In view of Evans' affirmative response, which confirmed her earlier suspicions about Evans, the dispatcher gave him a direct order to report to the North Platte terminal, which he refused. The dispatcher then directed Evans to "cushion home," that is, ride as a passenger on the next available bus back to Cheyenne.

Afterwards, the Omaha dispatcher first tried to contact Kooima and, when he could not be reached, she contacted Daubert, another relief driver waiting for an assignment out of North Platte. Kooima and Daubert were next in line for assignment after Evans. Daubert took the Omaha assignment refused by Evans.

In the meantime, Evans, with Kooima, proceeded to the North Platte terminal to see when Evans could cushion home as just directed by the Omaha dispatcher. On their way, they saw Daubert and learned that he took the Omaha assignment rejected by Evans. Evans laughed at Daubert for accepting the Omaha assignment, pointing out to Daubert that he should take his own measures to prevent being sent on unwanted work assignments.

The Omaha dispatcher reported the events of 22 August to the Respondent. Thereafter, the Respondent investigated the matter, including interviewing Evans, Kooima, and Daubert. Daubert told Goins of Evans' remarks. As a result of its investigation, the Respondent concluded Evans' purported sickness was a subterfuge to get out of the Omaha assignment and that Kooima had made himself unavailable to receive the Omaha assignment. Kooima had remained with Evans in the latter's motel room and made no attempt to notify the Respondent of his whereabouts, even though he knew that he was after Evans on the driver call-out list. Evans was discharged, while Kooima received a 15-day suspension. According to the Respondent, Evans received the stiffer punishment because he actually had refused a direct order from the Respondent and the Respondent viewed this insubordination in the context of his work record of the past 3 years.

In its deliberations over the 22 August incident, the Respondent compiled a list of 10 infractions committed by Evans in the 3 years preceding his discharge as reflected by Evans' personnel file. From this list, it can be observed that Evans received four disciplinary citations within the last 4 months of his employment. On 5 June, Evans received a 10-day suspension for an admitted speed and log violation occurring on 29 April. For a 5-hour-plus trip from Rock Springs to Cheyenne, Evans had deliberately reported in his log that he had actually made the trip in 4 hours, meaning that he would have to have had exceeded the speed limit by driving 64 miles per hour. On 7 July, Evans was instructed, reprimanded, and cautioned for failure to have his daily log up to date on 21 June in accordance with DOT regulations and company rules. On that occasion, Evans had driven from Cheyenne to Rock Springs and was on his way back to Cheyenne when he supposedly "ran out of driving time." Evans had supposedly reached the 10-hour limit prescribed by DOT and could not lawfully drive any further. Evans had not apprised the Respondent that he would be so close to the maximum allowable time limit before he left Rock Springs as the Respondent previously had instructed. Instead, he waited until he had started back from Rock Springs, necessitating the Respondent's having to meet Evans en route at Laramie at his bus to replace him with a fresh driver. When District Manager Goins met Evans at his bus that day with a fresh driver, Goins immedi-

ately demanded to see Evans' log. However, Evans' log was not up to date and did not show his departure time from Rock Springs to verify his driving time. Then, on 27 and 29 August, after having previously been instructed on 6 August, Evans received two written warnings for posting a numberplate, instead of the required nameplate, in his bus while on assignment. To the second of these reprimands was added a 4-day suspension which was never served because he was discharged for the 22 August incident a few days later before the 29 August discipline could be given to him. The Respondent contended that Evans' conduct over the 4 months prior to his discharge showed a developing pattern of insubordination.

The General Counsel has not alleged that these instances of discipline of Evans, which came after his DOT complaint, are themselves violative of Section 8(a)(1) of the Act. We therefore do not reach that issue. The General Counsel does claim that they do not form a convincing justification for a discharge having to do with a "past unacceptable work record." Moreover, the General Counsel cites, as did the judge, the cases of two drivers, Hall and Kooima, who testified they had refused trips from the dispatcher without being fired or, in one instance, even suspended, as evidence that Evans was treated differently because of his DOT complaint. We do not agree with the General Counsel and the judge on either of these points.

With respect to the 5 June 10-day suspension, we note that Evans deliberately violated a well-recognized company rule against speeding. This was the third speeding citation from the Respondent to Evans in the prior 12 months. Evans' other two speeding citations, for which he was instructed, cautioned, and reprimanded, were given long before Evans submitted his DOT letter on 8 May. Contrary to the judge, we do not find that suspension of an employee for his third speeding infraction is suspect. Nor do we regard the lag between this infraction and the administration of the discipline as indicative of an illegal motive, as the judge implied, since the offense actually occurred a week before the DOT letter was submitted to the Respondent. In reviewing Evans' other post-DOT complaint discipline and a 1979 incident, we find the same sort of time lag between offense and discipline being given. In addition, the 5 June suspension was also for Evans' failure to submit logs in a timely fashion, which would explain some of the delay on the part of the Respondent in this matter.

Contrary to the General Counsel, we do not view the discipline for the 21 June incomplete logbook incident as an attempt on the part of the Respondent to pad Evans' personnel file because of the DOT complaint. According to Evans, this was the only time that he was asked to show his logbook to District Manager Goins, even though this was one of the 6 to 12 occasions on which Goins had to meet Evans en route to Cheyenne out of Rock Springs. Evans' admitted practice was not to bring his log up to date until after completion of his run so, if Goins were trying to snare Evans, he missed many opportunities to do so to build a case against Evans. As recognized by the judge, Evans was playing games with Goins in calling for mid-trip driver relief on the trip back to Cheyenne from Rock Springs. We infer that any possible overreaction on Goins' part regarding the logbook was related to this games-playing rather than to the DOT complaint.

The nameplate infraction committed by Evans resulted in written reprimands and a suspension—all of which was superseded by the 22 August incident for which he was discharged. These disciplinary actions, as part of Evans' personnel file, are indicative of what the Respondent viewed, and we tend to agree, as a developing pattern of insubordinate conduct by Evans. Evans had been earlier instructed to abide by company policy and post his nameplate on his bus while on duty. Evans had a numberplate, which he had made, posted instead. Evans ignored the Respondent's instructions and continued to post his numberplate in his bus. His explanations for doing so were found unacceptable by the judge and we concur with the judge's conclusion.

Apart from finding Evans' work record as a sufficient basis for discharge, we also find no disparate treatment in the handling of Evans as opposed to his coworkers Hall and Kooima when they dropped sick in April and July, respectively. Unlike Evans, Hall and Kooima did not refuse a direct order, unquestionably designated as such by the dispatcher, to come take a job. When Hall and Kooima dropped sick, they did not state they would take a route in one direction, if it were home, but not in another direction even though approximately the same number of miles were involved. As opposed to Evans, Hall and Kooima did not coach another driver on how to get rid of unwanted work assignments. Here, the Respondent was faced with the situation of Evans attempting to coach and even coaching his coworkers on how to pick and choose assignments, which would jeopardize the Respondent's driver call-out operations. Unlike Evans, when Kooima received his 10-day suspension for the July incident in Denver, Kooima did not have any previous infractions within the past 12 months on his record at the time. With respect to Hall, there is no indication from the

record evidence that he had any previous infractions on his work record at the time of the April incident when he was reprimanded for foul language to his supervisor. Actually, Hall did receive two reprimands for refusing trips by dropping sick on two other occasions.

Accordingly, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was heard at Cheyenne, Wyoming, on February 23 and 24, 1982, based on a complaint alleging that Greyhound Lines, Inc., called Respondent, violated Section 8(a)(1) of the Act by terminating the employment of Robert P. Evans because of his having engaged in protected concerted activities of expressing employee concerns to the United States Department of Transportation, and attempting to enforce and utilize provisions of the applicable collective-bargaining agreement between Respondent and Amalgamated Transit Union, Division 126, called the Union.

On the entire record, my observation of witnesses and consideration of posthearing briefs, I make the following

FINDINGS OF FACT AND RESULTANT CONCLUSION OF LAW

From 1974 until being terminated on September 3, 1980, Evans was an extraboard driver attached for practically all that time span to the Cheyenne district while maintaining a personal domicile in Denver. Major segments of transcontinental bus service in this vicinity included east-west schedules between Cheyenne-Rock Springs, Cheyenne-North Platte, and the North Platte-Omaha continuation. Cheyenne south to Denver was another heavily traveled corridor. Approximately 125 drivers operated out of Cheyenne, with a highly structured labor contract pertaining to their work and applicable industry governance stemming from statutory and regulatory authority of the U.S. Department of Transportation (DOT). Their earnings were tied directly to the number of miles actually driven as the operator on a scheduled bus run, or duplicate run (section) needed for extra passengers. Oliver Goins Jr. had become district manager in April 1980, heading a superintending group in which James Russell was his assistant and four operations managers functioned primarily to fulfill dispatching needs as these would match drivers and equipment to customer load. Goins reported to regional official Jack Haugsland, who was in turn under Regional Vice President James Nenow.[1]

Business is seasonably higher during summer months, yet generally Respondent runs about 10 daily bus trips in each direction between the points 4 hours and 50 minutes, some stopped at the intervening cities of Rawlins and Laramie on a 5-hour schedule, and some operated locally off the interstate highway on an allotted time close to 6 hours. Most of the Cheyenne-based drivers handled nonlocal Rock Springs service by "hot-turn[ing]" it on the basis of driving the 256 miles west to Rock Springs, then returning a schedule to Cheyenne in compliance with DOT regulations that limit driving time to 10 hours within any 24-hour period unless 8 hours' rest has intervened.

As a practical matter this requirement was not precisely met, for those involved were tacitly aware that the Rock Springs-Cheyenne run was marginal as to DOT compliance when drivers "hot-turned." Evans testified flatly that it could not be done, while Freeman had closely established the trip as 5 hours and 3 minutes in duration. Goins, whose testimony will be commented on in general below, insisted that the principal through runs were completable in just 5 hours each way. The entire matter of expectable length of time for this trip associates largely to the present-day 44 mph speed limit, and the vagaries of mountain driving both from standpoints of weather and pulling up grades.

Commencing about 4 years ago Evans began a practice of not attempting to hot-turn the Cheyenne-Rock Springs/Rock Springs-Cheyenne schedule. This was achieved by simply "declar[ing]" a rest entitlement whereby he stayed over at Rock Springs for at least 8 hours and then returned to contention for a driving assignment back to Cheyenne.[2] He was, however, long a critic of the hot-turning practice between these points. He believed that it tended to compromise safety both because high and unlawful speeds were needed to conform with bus timetables, and that drivers so engaged (of which most in the Cheyenne district did) were flirting with the likelihood of subtle fatigue factors. Additionally, Evans had become active in two national organizations. One urged that drivers such as Greyhound's be equipped with citizens-band radios, and the other was a dissident association formed from the ranks of Greyhound drivers as the Association of Concerned Employees, Inc. (ACE). Aims of ACE were such that it was generally viewed as a force opposed to policies of both Respondent and the Union, to the extent that these would dovetail or harmonize.

On April 29, 1980, Evans deliberately hot-turned the Rock Springs-Cheyenne run and submitted a driver's log for the return segment indicating he had traveled the 256-mile distance in 4 hours. Before any reaction to this manifested he prepared and submitted a letter dated May 1, 1980, to DOT, which set forth several complaints of

[1] Respondent maintains its principal office and place of business at Greyhound Tower in Phoenix, Arizona, and is engaged nationwide in furnishing interstate transportation of passengers and freight, annually deriving gross revenue in excess of $50,000. Harry Freeman, a driver having 18 years' service with Respondent, was at all material times chairman of the Union's Cheyenne division. In light of these admitted or evident facts, and the settled collective-bargaining relationship between the parties, I find that Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act, and otherwise that the Union is a labor organization within the meaning of Sec. 2(5).

[2] DOT regulations forbid the operation of a motor vehicle by a person who is ill or fatigued. 49 C.F.R. § 392.3.

"flagrant disregard" by Greyhound, instancing his communication with the Cheyenne-Rock Springs schedule as impossible to fulfill within the allotted 5-hour driving time. He received ghost writing assistance in composition from Lyle Kooima, another Cheyenne-based driver who was also known as having dissident leanings and ACE membership. On the date this letter bore, Evans hand-delivered one of the several distribution copies to Goins in the latter's Cheyenne office.[3]

In consequence of this, DOT representatives met with Goins on May 13 about the Evans complaint, and projected the tone of an investigation to him. The essence was to soon start riding the Cheyenne-Rock Springs schedules, after first notifying Greyhound so that a particular bus to be boarded was mechanically sound. Goins was also advised that their primary objective was to ascertain whether this passage was truly pullable by no more than 10 hours of driving. Goins messaged the highlights of this meeting to his superiors, and true to their word DOT followed up with investigation. The upshot here was a letter dated July 9 written to Respondent's Phoenix-based senior safety-director, in which the findings of a round trip ride undertaken by a DOT representative on May 15 showed the 512-mile trip required 10 hours and 12 minutes driving time with posted speed limits being exceeded over a total of 8 miles. The letter requested remedial action and advice of same to DOT. After an intervening written acknowledgment, Respondent's safety official advised DOT by letter dated August 15 of a decision to no longer dispatch drivers on a round-trip basis for the Cheyenne-Rock Springs run without their obtaining "required rest." On the apparent basis of earlier internal advice, Goins had posted a notice to all drivers of his district on August 14. It read:

> Due to the road construction, we have been instructed to cease the practice of turning Rock Springs without securing 8 hours rest.
>
> This is effective immediately. Therefore, all operators are hereby requested to contact dispatch upon arrival in Rock Springs, giving them the exact time of arrival.
>
> Thank you for your cooperation and support in this area.

As these dynamics transpired over the summer months, Evans had remaneuvered by deciding to hot-turn at Rock Springs even "knowing that it couldn't be done." The result of such a gambit was that at some point in or east of Laramie Evans would run out of legal driving time, and, having communicated ahead, would be met by a relief driver cushioned westward from Cheyenne, or perhaps even Goins himself when logistics so required. On the estimated 6 to 12 occasions that Goins and Evans rode back into Cheyenne after such spelling, a conflict of testimony is present as to what discussion passed between the two men. Evans recalled being asked repeatedly why he was "rocking the boat" or "doing this sort of thing." Evans added being told to reflect on why he even kept the job if he did not like it, and that on one occasion Goins seemingly became exasperated when a tape recorder failed to function. Goins denied all such or similar comment, denied ever attempting to tape-record one of the conversations, and recalled only that a particular topic was about the Bible.

The precipitating incident in this case arose on August 22. Evans had arrived in North Platte at an early morning hour, entered the hotel used by Greyhound drivers, and retired, having had some stomach problems throughout the working day just ending. After a full night's sleep Evans arose and was joined around noontime by Kooima, who had just driven a bus that far. Still together around 6 p.m. they had checked the station log and Evans concluded from this that he stood a chance of pulling a westbound schedule about 12 hours later. They ate, returned to Evans' room, and were still together when he was telephoned at 11 p.m. Evans testified that the caller identified herself as Joyce Judd, an Omaha dispatcher, who said that she needed him "to show" an hour later. Evans said he had not actually been feeling well and should now be dropped sick. This prompted Judd to ask why he had not called the condition earlier, and Evans explained that he had found "no work showing" and anticipated sufficient recovery with another night's sleep. Judd then voiced a "direct order" that he show, but Evans parried this by reiterating his election to drop sick, mentioning in the process that he had a witness to the conversation. She then classified him as cushioning home on his own, which Evans conceded was his immediate course of action. Kooima corroborated that Evans had not, during his conversation with Judd, inquired about the destination of the work for which she wanted him to show.

Judd's version is that she simply reached Evans and identified herself as "Greyhound" calling, to which Evans paused and then asked what the work would be. She said it was an Omaha run and after another hesitation Evans asked to be dropped sick. Upon this Judd assertedly asked if he were well enough to drive to Cheyenne and Evans affirmed on this. The foundation having thus been laid, Judd conveyed a direct order that Evans shortly drive to Omaha. On his disclaiming the refusal to obey a direct order because of suddenly reported illness, she told him to cushion home. Omaha dispatcher Donald Lein had been motioned onto an extension phone by Judd as her conversation with Evans progressed, and he testified to hearing Judd tantalize with the Cheyenne bait which seemed palatable enough to Evans. Both Judd and Lein soon memorialized their respective involvements in the telephone conversation, and the entire matter reached Goins as an ostensible act of insubordination.

On August 26 Goins interviewed Evans about the matter with both Russell and Freeman present. Goins and Freeman both testified that Evans admitted having told Judd that he was well enough that night to work a Cheyenne-bound schedule but not one to Omaha. Evans denied making such an admission while Russell, whose file memo on the interview does not so allude, also testified to Evans' "indication" of having felt good enough to go to Cheyenne on the night in question. Following this

[3] All dates and named months hereafter are in 1980, unless shown otherwise.

Goins reviewed personnel records and extracted 10 infractions of the past 3 years including 2 fresh ones of late August rendered by Goins himself for nameplate violations. On September 3 Goins reached Evans by telephone at the latter's Denver residence from which he was in the process of moving, and attempted inveiglement of him into the station. Evans dodged this but before the day was out Cheyenne dispatcher John McKnight also contacted Evans, and emphatically requested that he handle a run. Evans agreed, arriving at Cheyenne station from Denver that evening where Goins awaited him. A termination notice based on insubordination coupled with a past unsatisfactory work record was delivered to Evans, who did not stay long enough to actually receive the two reprimands for not having a nameplate posted while operating his bus.[4]

As evidently it is, both parties have briefed this matter as a pretext case. The General Counsel argues that disparate treatment is sufficiently shown from collateral facts, while Respondent insists that an applicable "case-by-case" approach to discipline revealed a temperate, nondiscriminatory decision by Goins. The resolution of credibility is critical here, for certain subtleties are present in the entire assignment and performance process whereby Greyhound busdrivers function in such highly visible manners to both supervisory hierarchy and the traveling public. I am not fully satisfied with Evans' candor, and although much of his testimony is believable I discount it in certain particular aspects. More significantly, I am impelled to heavily discredit Goins. His demeanor leads to this conclusion, coupled with a tendency to contrive explanations and unpersuasively shift his recollections on closer questioning. The witnesses fully credited are Judd, Lein, Russell and, on points not as yet described, drivers William Hall and Donald Daubert. In the process of assessing testimony I also have doubts about Kooima, who appeared all too eager to back up Evans' contentions and who exuded a mild disregard for truth.

The vital episode of August 22 must be viewed in light of testimony from Hall and Daubert. The former, an 8-year Greyhound employee with stationing in Cheyenne since 1977, testified that in April 1980 he had dropped sick when a dispatcher had sought him to forge on to Omaha after being 15 hours in North Platte. There had been several occasions prior to this when Hall avoided such an eastward run by dropping sick and simply cushioning back to Cheyenne. He testified that respecting the particular April incident he had protested this requirement to a Denver dispatcher by immediately telephoning that person and angrily asking to be excused from the aegis of Omaha. When Denver gave him only sympathy Hall fumed out a profanity and cushioned back, earning a reprimand from Goins in the process for ultimately couching nonacceptance of the work as being sick with a toothache.

Daubert was the driver who actually took the midnight run to Omaha on what actually fell as early morning hours of August 23. He credibly testified to having been unexpectedly called for the assignment, unexpectedly in the sense that he had been below both Evans and Kooima on the assignment board until abruptly reached by Omaha dispatch.[5] In the course of these dynamics, Evans had taunted Daubert about consenting to the unwelcome eventuality, pointing out that clever self-help could have avoided it. Daubert later reported the gist of these remarks to Goins, when the latter requested information about what might have been said to him that night. The protagonists in this case, Evans and Goins, were clearly locked in a cheerless form of cross-aggravation. However it is only Goins' principal that is on trial, and this must be emphasized regardless of provocations shown. Further Evans did, for the most part, hew to a careful line in pressing his beliefs. The general past employment record upon which Goins seized is essentially not alarming. In the span of late 1978–late 1979 Evans had been reprimanded for several rather routine infractions concerning a miss-out, dereliction in preparing daily logs, and two speeding violations. To the extent that Kooima is creditable, the miss-out and the log violations were inconsequential, while speeding by drivers is simply a regrettable fact of life on this job many times. Another infraction during this same period related to citizen-band radios, and as to this Evans was both known as a strong supporter of CB use and the matter was quite stale.

There is thus a rather weak basis on which to postulate serious discipline against Evans, and the remainder of his record and its handling by Goins begin to show a suspicious overreaction. First, a P–120 embodying 10 days' suspension in June was based on Evans' deliberate challenge to the Cheyenne-Rock Springs run as done and recorded on April 29. Goins did not satisfactorily explain the long delay in rendering such discipline, and this oddity must be noted in light of what was shown as his definite distaste for the DOT complaint. Secondly, there was no attempt to balance a review of Evans' past record by at least conceding existence of Russell's letter of appreciation dated December 21, 1979.[6] The three final items of discipline, one of them relating to a log violation and the remaining two concerning nameplates, are contaminated by Goins' credibly shown animus toward Evans arising from existence of the DOT com-

[4] The first of these was based on Goins' observation of August 26 and constituted a severe reprimand for attempting to drive with only an employee nameplate positioned for passengers to see. This action, styled a "P–120" as commonly used by Greyhound for all types of personnel entries, also alluded to a still earlier instructional reminder on the problem dated August 6. The second P–120 available at the time of termination was dated August 28 and charged "willful disobedience" of the nameplate rule, assessing a 4-day suspension for the infraction. This more stringent discipline was academic both because Evans was engaged in his home closing during the suspension period of August 30– September 3, and because the action of terminating him superseded the lesser discipline except as a part of his personnel record by Goins' view of things.

[5] Following the 11:10 p.m. call to Evans, Judd had unsuccessfully tried to contact Kooima, who was of course sheltered by his enscouncement in Evans' hotel room. Kooima was declared a "miss-out," meaning inexecusably not within reach on this occasion. From this the assignment filtered to Daubert, and Kooima absorbed a 15-day suspension for the episode.

[6] I give no weight to the entry of a "good" attitude on Evans' part when counseled by Russell early in 1980 about prompt reporting of illness when away from Cheyenne, or the commendatory personnel record entries of 1975–1976. The former item has little materiality to issues here, and the earlier writings are too remote.

plaint. In this regard I credit the testimony of Evans and Kooima, and find that Goins deliberately contrived a P-120 on June 21 wherein hypertechnical and unrealistic standards were applied to the currency of a driver log which Evans could not realistically have been expected to have current to the hour. It must be remembered that this event arose in the course of the several occasions on which Evans was unceremoniously relieved just short of his returning Cheyenne destination, and regardless of the exasperations this might have triggered it was fundamentally something that was rooted in Respondent's erroneous design of that route. I am satisfied that Goins was incapable of segregating his unlawful dismay about, on the one hand, Evans' gadfly-like aggravations that most other drivers were content to scorn, and his entitlement to have acted for concerted purposes through the complaint to DOT on the other hand.[7]

In this general context I return to the night of August 22, and find that as credibly testified Judd did not initially identify the source of her call but only that she was routinely focusing on Evans as the person viewed by configurations of that moment as the individual next up to drive. In keeping with his demonstrated unwillingness to sincerely comply with ordinary expectations of the work setting,[8] he momentarily bobbed and weaved, then floated the trial notion of possibly earning income for the time to be spent in a Cheyenne return, and finally, when fully spotlighted by Judd's "direct order," escaped into the sanctuary of supposed illness as a final ploy in avoiding the hated assignment onward to Omaha. This finding is expressly based on crediting Lein's corroborative testimony, and on the recollection of Daubert who grumblingly accepted elevation to driver coverage that night. Respondent thus was presented with cause for discipline; however, Goins' action in making it outright discharge was unlawfully motivated based on my view of the evidence as a whole. The particular indicators of actionable disparate treatment are that Hall had, in the same general time span, been more lightly disciplined for an even more fractious gambit, and Kooima's extensive disciplinary record tends to persuade that Goins was aiming only for Evans.[9] The balance of things is critically tipped by accepting Evans' testimony that Goins had angrily challenged his invocation of DOT, and I find that resolution of the matter a scant week or so before the supposedly dischargeable offense was personally rankling to Goins both as a reflection on his managerial integrity and as a cost factor to his district's operations. I credit Evans' important testimony that he did not, as contrarily claimed, admit to past gamesmanship during the August 26 interview by Goins. In this I discredit Goins, Russell, and Freeman, but find that Russell's contemporaneous written minutes of the meeting is significant in its silence on such a point. This results in an ultimate showing that Respondent, by Goins as its key agent, would not have discharged Evans but for his having been instrumental in successfully invoking DOT agreement to what he had so long criticized about the Rock Springs run.

I have considered the institutional background aspect of things, noting that in the recent past Greyhound has been held in violation of the Act only on one occasion.[10] This is *Greyhound Lines*, 251 NLRB 1638 (1980), in which concerted behavior of publicity and job actions relating to the national 55 mph speed limit resulted in a finding of violation as to discipline taken. On appeal, a fair characterization of the court's action was that the Board's holding in that recent *Greyhound* case won only reluctant enforcement. *NLRB v. Greyhound Lines*, 660 F.2d 354 (8th Cir. 1981). There can be many variables in why a major employer is essentially free of significant labor law violation; however, suffice it that this case is formidably a specific fact situation with human foibles contributing greatly to the holding that I make.

Accordingly, I render a conclusion of law that Respondent, by discharging Evans because of protectedly expressing common employee concerns to the United States Department of Transportation regarding bus scheduling policies, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

[7] I shall conclude that the alternate theory of the General Counsel's complaint, assertively seeking to enforce provisions of a collective-bargaining agreement, is based on subterfuge by Evans and is thus not a successful basis on which to further contend that a violation has occurred. The provision in question was a certain article CNS-80 of the ATU contract, in which an operator "book[ing]-off due to sickness" was entitled to transportation home followed by 12 hours' removal from the extra-board.

[8] This refers to what was actually troublesome cuteness in contriving not to finish his Cheyenne returns from April onward, and puerile explanations for why he could not arrange to consistently mount a nameplate as has been readily done by practically all other drivers.

[9] I discredit the testimony of the General Counsel's confused and unimpressive-seeming witness Dale Owens, and thus decline to find that some nameless dispatcher had predicted Evans' firing by a passing remark in late August.

[10] A proceeding based on claim of violation of the doctrine of *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), and coincidently dealing with CB radio usage, was found to be without merit. *Greyhound Lines*, 239 NLRB 849 (1978).